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UNITED STATES GOVERNMENT
National Labor Relations Board

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Memorandum

TO : Bruce Gillis, Jr., Director
Region 27

DATE: August 4, 1986

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

RELEASE

177-1650
625-3300
625-6687-1300

SUBJECT: Weitzel Redi-Mix
Case 27-CA-8523-2

A.D. 05511

This case was submitted for advice as to whether (1) an employer who purchases a business with notice of unfair labor practice charges pending against the predecessor is a Golden State 1/ successor when it has no statutory employees of its own and leases all of its employees from another company; (2) the leasing company is a Golden State successor.

FACTS

The underlying facts are set forth in the Advice Memorandum in the instant case dated October 31, 1985, in which we concluded that Trans Colorado Concrete, Inc. (TCC), was a Golden State successor to Weitzel Redi-Mix, Inc., and was obligated to remedy the predecessor's Section 8(a)(1), (3) and (5) violations even though when TCC bought Weitzel, it had no statutory employees and leased its employees from People Power, Inc. (PPI), an independent leasing company which had hired a majority of the Weitzel employees. We noted that the sales agreement between Weitzel and TCC had specifically obligated TCC to assume the liability for any Board orders requiring the reinstatement of the allegedly unlawfully discharged Weitzel employees. We further noted that, at that time, TCC and PPI did not appear to be joint employers.

The only TCC employee is Peter Jackson, the president. All other people who work for TCC, including the operations manager, drivers, salespeople, office clericals, etc., are described in the PPI "Client Service Agreement" as employees of PPI. This agreement states that PPI has exclusive authority to

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1/ Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973).

hire, fire, evaluate, and discipline employees and that PPI determines the employees' benefits package (i.e., medical and dental insurance, vacation and overtime policies, etc.). The client service agreement also gives PPI the authority to appoint an on-site supervisor. However, PPI's advertising material describes its procedures as follows:

> Employee Leasing is a tested and accepted concept in which a business owner's employees are transferred, by contractual arrangement, to a professional employer. Those same employees are then leased back to that business with the owner retaining supervisory control and task direction of the work force. (emphasis added)

However, should a job applicant come to the TCC facility, Jackson will interview the person and, if Jackson is favorably impressed by the person, he will refer the applicant to the operations manager, who is a PPI employee. If Jackson is dissatisfied with a PPI employee, he tells the bookkeeper (another PPI employee) that TCC will no longer lease that employee, that the employee should be removed from the TCC payroll, and that the bookkeeper should so notify the PPI office. Jackson negotiated the employees' wages with PPI, which bills Jackson for actual payroll costs plus a percentage, which PPI retains as its profit. Jackson asserts that PPI cannot change the employees' wages without his consent, and that such a requirement is the only way he has of controlling his employee costs. Jackson further asserts that if he is pleased with an employee's performance, he directly tells the bookkeeper to give that employee a bonus. Furthermore, Jackson was responsible for the appointment of the operations manager, who had been a unit employee. Jackson was impressed by this employee and told PPI to put him "on salary" and then to appoint him operations manager.

TCC and PPI apparently have no common ownership. PPI has other customers that are business entities with no connection to TCC.

ACTION

We concluded that TCC and PPI are joint employers with a joint obligation under Golden State to remedy Weitzel's unfair labor practices.

Two entities will be found to be joint employers where they share or codetermine "matters governing the essential terms and conditions of employment."2/ The essential aspects of the employment relationship considered in determining joint employer status are those involving hiring, firing, discipline, supervision and direction. 3/

In the instant case, the evidence indicates that TCC and PPI have a joint employer relationship. There is evidence that Jackson makes hiring and promotion decisions, in that he told PPI that a certain employee should be "put on salary" and promoted to operations manager, and PPI complied with this directive. Moreover, while the employees working at the TCC facility are nominally employees of PPI in that they are paid by PPI and under the direct supervision of a PPI operations manager, TCC president Jackson directs certain job applicants to the PPI operations manager and tells the PPI bookkeeper to take other employees off the TCC payroll. There is also evidence that Jackson controls employees' wages to a significant degree. Jackson and PPI negotiated Jackson's costs by negotiating the wages that the employees would receive; this agreement, Jackson admits, is the way that he controls his labor costs. Even more significantly, Jackson claims that he directly instructs the bookkeper, ostensibly a PPI employee, to give bonuses to other employees. Thus, the evidence indicates both that Jackson directly implements certain decisions concerning employee benefits (i.e., bonuses) and that he directs PPI to implement other decisions that he has reached (i.e., the promotion of an employee to operations manager). Such facts distinguish the instant case from such cases as Laerco, supra, and TLI, 4/ where a joint employer relationship was not found, in part because the company contracting for labor services merely told the labor broker that it was dissatisfied with an employee's performance and left all questions of discipline and promotion to the broker.

The fact that TCC does not appear to have any statutory employees on its own does not warrant a contrary result. 5/ Given

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2/ Clinton's Ditch Cooperative Co., Inc., 274 NLRB No. 103, slip op. at 2, n. 3 (1985), enf. den. 120 LRRM 3562 (2d Cir. 1985).

3/ Laerco Transportation and Warehouse, 269 NLRB 324, 325 (1984).

4/ TLI, Inc., 271 NLRB 798 (1984).

5/ Cf. Teamsters Local No. 688 (Air-ways Cab Co.), 277 NLRB No. 181 (1986).

the joint employer relationship with PPI and TCC's control over the essential indicia of employment of PPI's employees, the relationship between TCC and PPI is a joint employer relationship, and TCC is therefore, in our view, a statutory employer. As such, TCC is a Golden State successor obligated to remedy its predecessor's unfair labor practices.

We noted in our initial Advice Memorandum that PPI appeared to have hired a majority of Weitzel's former employees. PPI has also hired an unknown number of other employees. Thus, it is not clear at this point whether a majority of PPI employees were Weitzel employees. However, the possibility that a majority of PPI employees were not Weitzel employees does not bar PPI, together with its joint employer TCC, from being found to be Golden State successors, since that status may depend at most upon the successor's hiring of some of the predecessor's employees, not upon the predecessor's employees representing a majority of the successor's employees. 6/

We also concluded that TCC is liable for the predecessor's unfair labor practices under a different theory, that articulated in Emerson Electric Company, 7/ and Liberty

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6/ See, e.g., The Bell Company, 243 NLRB 977, 979 (1979), where a successor who hired three of the predecessor's seven employees was found to be a Golden State successor. In Airport Bus Service, 273 NLRB 561 (1984), the Board found that Fugazy was not a successor to Holland New York II because the General Counsel failed to prove that a majority of Fugazy's unit employees had been employed in the relevant units by Holland New York II when Fugazy acquired Holland New York II's operations. Therefore, the Board held that Fugazy was not responsible for its "predecessor's" unfair labor practices, which included violations of Section 8(a)(3). However, we noted that in Airport Bus, the Board: (1) cited NLRB v. Burns Security Services, 406 U.S. 272 (1972), and other cases dealing with the Section 8(a)(5) obligations of successors; (2) did not discuss or even cite Golden State, supra; and (3) did not explicitly overrule, discuss, or even cite The Bell Company, supra. Accordingly, we believe that the Board inadvertently and mistakenly applied a Burns analysis to a Golden State issue and did not intend to establish a rule that a finding of Golden State successorship depends upon a showing that the predecessor's employees comprise a majority of the new employer's work force.

7/ 176 NLRB 744 (1969).

Electronics Corp., 8/. In those cases, successors bought predecessor businesses with the clear and explicit statements that they were responsible for and agreed to remedy the predecessor's unfair labor practices. The successors then attempted to disclaim the liability that they had assumed in their purchase agreements. The Board held in both cases that the successors were obligated to comply with their contractual assumptions of the potential liability. In the instant case, TCC similarly agreed, in the sales agreement it entered into with Weitzel, to assume Weitzel's reinstatement liability. Thus, while TCC is a Golden State successor because it took over Weitzel with knowledge of the pending Board proceedings, it is also liable for Weitzel's unfair labor practices because it expressly assumed that liability when it entered into a sales contract with Weitzel.

For the above reasons, we concluded that the Region should continue to process the outstanding complaint and allege that TCC is obligated to remedy Weitzel's unfair labor practices.

H.J.D.

8/ 143 NLRB 605 (1963)